TENGKU ABDUL AZIZ v. PUBLIC PROSECUTOR.

[Court of Appeal (Foster Sutton, C.J., Taylor and Wilson, JJ.) September 8, 1951]

[Criminal Reference No. 6 of 1951; Kuala Trengganu Criminal Appeal No. 3 of 1951]

Criminal Procedure Code ss. 129(i)(v) and 173 — Sanction to prosecute — When "acted upon" — Summary trial — Procedure.

In this case the necessary sanction to prosecute was granted by the Deputy Public Prosecutor on the 11th November, 1950. On the 11th December, 1950, the Police applied for a Summons, but the Magistrate did not give his direction that the summons should issue until the 2nd January, 1951. Sub-section (v) of section 129 of the Criminal Procedure Code provides that no sanction given under the provisions of sub-section (i) of that section shall remain in force unless acted upon within one month from the date on which it was given, and the appellant's Counsel argued that a sanction is not "acted upon" until the Court directs that the Summons should issue.

Held, (1) that the sanction is acted upon when the Public Prosecutor applies to the Court for the issue of process, and in this case that was done within the required period; (2) that in view of the combined effect of the second schedule of the Criminal Procedure (Amendment) Ordinance, 1947, and section 61 of the Courts Ordinance, 1948, the procedure laid down by section 173 of the Criminal Procedure Code for summary trials by Magistrates is applicable to summary trials in the Sessions Courts.

The King v. Power held not applicable to Magistrate's Courts of the Federation of Malaya.

Cases referred to :—

(1) *Soo Sing v. Public Prosecutor* (1951) M.L.J. 143; 2 M.L.R. 122.

(2) *The King v. Power* (1919) 1 K.B. 572.

CRIMINAL REFERENCE.

R. D. Hume for the appellant.

J. V. M. Shields (Federal Counsel) for the respondent.

Judgment of the Court of Appeal was delivered by :—

Foster Sutton, C.J. : — This is a Reference to the Court of Appeal by Briggs, J., under the provisions of section 34 of the Courts Ordinance, 1948.

The appellant was charged and convicted under section 193 of the Penal Code for making two contradictory statements, one of which he either knew or believed to be false or did not believe to be true. The first statement was given by him during the course of a police investigation and the second before a Sessions Court, during a criminal trial arising out of the police investigation.

Under the provisions of section 129(i) of the Criminal Procedure Code, no Court may take cognisance of any offence punishable under section 193 of the Penal Code except with the previous sanction of the Public Prosecutor.

In his Certificate of Grounds of Judgment, Briggs, J. says *inter alia* :—

"I have to raise a point which neither counsel then dealt with; that is the question at what stage the sanction is "acted upon" within the meaning of section 129(v). It was assumed by both counsel that this did not take place at the time of application for the issue of process, but only when the summons was issued, or at least when the Magistrate gave directions that it should issue. I assumed the correctness of that view and based my decision upon it. But I now feel some doubt whether it was correct. It seems to me at least arguable that, as the sanction to prosecute, though in form addressed "To whom it may concern", is really directed to the intending prosecutor and not to the Court, it is "acted upon" when the prosecutor has done all that he can do, i.e. applied for the issue of process, even though the Court has not done its part by issuing or directing issue of process upon that application."

The necessary sanction to prosecute was granted by the Deputy Public Prosecutor on the 11th November, 1950. On the 11th December, 1950, the Police applied for a summons, but the Magistrate did not give his direction that the summons should issue until the 2nd January, 1951. Sub-section (v) of section 129 of the Criminal Procedure Code provides that no sanction given under the provisions of sub-section (i) of that section shall remain in force unless acted upon within one month from the date on which it was given, and the appellant's counsel argued that a sanction is not "acted upon" until the Court directs that the summons should issue. With that contention we are unable to agree. In our opinion, the sanction is acted upon when the Public Prosecutor applies to the Court for the issue of process, and in this case that was done within the required period. It follows, therefore, that the case was properly before the Court.

The record of the criminal proceedings referred to in the charge in this case was produced and admitted in evidence, without formal proof, a procedure sanctioned by section 80 of the Evidence Ordinance, 1950, but no evidence was offered by the prosecution identifying the appellant as the person who gave the evidence which formed one part of the subject matter of the charge. At the close of the case for the prosecution in the Court below, the appellant's counsel submitted that there was no case to answer, but that submission was over-ruled and the appellant gave evidence on affirmation, during the course of which he admitted that the statement as shown in the record of the criminal proceedings referred to above "is the statement that I made there on oath".

In the case of *Soo Sing v. Public Prosecutor*[1] the Court of Appeal held that paragraph (f) of section 173 of the Criminal Procedure Code requires

a Magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if un-rebutted, has established the case against the prisoner beyond all reasonable doubt, and that the case of *The King v. Power*[2] is not applicable to the Magistrate's Courts of the Federation of Malaya.

In our opinion, the combined effect of the second schedule to the Criminal Procedure (Amendment) Ordinance, 1947, and section 61 of the Courts Ordinance, 1948, is to make the procedure laid down by section 173 of the Criminal Procedure Code for summary trials by Magistrates applicable to summary trials in the Sessions Courts. That being so, in our view, the appellant should have been acquitted and discharged at the close of the case for the prosecution in the Court below, because at that stage of the case the prosecution had failed to prove that the appellant was the person who had made one of the alleged contradictory statements which was an essential element of the charge.

For the reasons I have already given, the appeal is allowed and the conviction and sentence set aside. In view of the conclusion we have reached regarding the validity of the sanction to prosecute, it is unnecessary for us to deal with the other point raised by Briggs, J. in his Certificate of Grounds of Judgment.

Appeal allowed.

PUBLIC PROSECUTOR v. TAN THOY.

[Orig. Crim. Juris. (Taylor, J.) September 27, 1951]

[K.L. — Selangor Criminal Trial No. 38 of 1951]

Emergency Regulations — Regulation 6A(1) — "Consorting" — Meaning of.

The word "consorting" in the Emergency Regulations includes associating with a bandit, or bandits, not necessarily the same individuals, continuously over a period or on a series of separate occasions, or for a single short period with community of purpose.

Case referred to :—

(1) *Tan Choon Chuar & Anor. v. Public Prosecutor* (1950) M.L.J. 200; 1 M.L.R. pp. 155 & 216.

CRIMINAL TRIAL.

D. M. K. Grant (D.P.P.) for the Public Prosecutor.

Accused in person.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — This accused, who is aged 37 and virtually a widow, her husband having been missing since the Japanese occupation, was charged under Emergency Regulation 6A(1) with consorting with a named person who had recently acted against public order, an offence punishable with imprisonment only and therefore tried without Assessors. She was not defended by an advocate.

The case, shortly, was that a Police party, acting on information, went to her house in the middle of the night, in disguise, and asked for another man by name; they did not know that man by sight but believed him to be a bandit; she said that he was not there. She then led the party into a coffee plantation a short distance from her house where, in response to her call, two or three persons emerged with torches. The Police immediately opened fire killing the man named in the charge who was found with a handgrenade within arm's length; apparently, he had been on the point of throwing it when he was hit. A blood trail indicated that another man had been wounded but he was not found. The third man, if there was one, escaped. There is evidence indicating that the second or third man was the son of the accused but as he escaped, this could not be established.

At the close of the case for the prosecution, I called on the Deputy Public Prosecutor to show that what the evidence disclosed amounted to consorting. The term is not defined in the Regulation and therefore must have its ordinary plain English meaning. From time to time judges have explained the meaning of the term in these Regulations when summing up to Assessors but such rulings are necessarily limited to the facts of each individual case and, unless a number of them could be collected, would afford little assistance. I do not know of any reportable expressions of opinion and no authorities of any kind were cited.

"Consorting" must mean something more than "being in company with" because the latter is a distinct offence under the Regulation. The Deputy Public Prosecutor submitted that the relationship between the accused and the armed person need not go beyond mere acquaintance, and with that I agree but the association must be either more intimate or more sustained than mere acquaintanceship involves.

The word is derived from "sortem" but its meaning has gradually moved so far from the Latin that the etymology does not assist. In ordinary English, "consort" as a noun is used in the good sense, meaning a spouse, but "consort" as a verb is generally used in